No. 22132

IN THE

United States Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY,
Appellant,

vs.

CHARLES WALKER and
HARTFORD ACCIDENT AND INDEMNITY
COMPANY, *Appellees.*

Brief of Appellant

FIREMAN'S FUND INSURANCE COMPANY

On Appeal from the United States District Court for the District of Montana

---

KELLER, MAGNUSON AND REYNOLDS
AND GLEN L. DRAKE
DAVID O. DEGRANDPRE
Attorneys at Law
6-10 South Annex, Power Block
Helena, Montana
Attorneys for Appellant

INDEX i

CASES CITED

page

STATUTES CITED

No. 22132

IN THE

United States Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY,
Appellant,

vs.

CHARLES WALKER and
HARTFORD ACCIDENT AND INDEMNITY COMPANY, *Appellees.*

Brief of Appellant

FIREMAN'S FUND INSURANCE COMPANY

On Appeal from the United States District Court for the District of Montana

STATEMENT OF PLEADINGS AND FACTS ESTABLISHING JURISDICTION

This action was commenced by the Appellees (Plaintiffs below) pursuant to the provisions of 28 U.S.C. A. Sections 2201 and 2202 (Declaratory Judgment); the amount in controvery exceeds Ten Thousand and no/100 Dollars ($10,000.00) exclusive of interest and costs; one of the Appellees is a citizen of the State of Montana and the other Appellee is a citizen of the State of Connecticut, and the Appellant is a citizen and resident of the State of California. The judgment en-

tered by the Court below is reviewable by this Court pursuant to the provisions of 28 U.S.C.A. Section 2201, and pursuant to the timely filing of Notice of Appeal by Appellant pursuant to the provisions of Fed. Rules Civ. Proc. rule 73, 28 U.S.C.A. Jurisdiction over the person of the Appellant was obtained by proper service of summons by the Appellees. Said Complaint is found on page 1 of the record herein and said summons is found on page 4 of the record herein.

STATEMENT OF THE CASE

The sole issue involved in this case, both in the court below and on appeal to this Court, is the proper interpretation of the "employee exclusion" clause contained in the Appellant's liability insurance policy in issue here. No other coverage question is presented as it is admitted that the injury incurred by one Lester J. Stewart (an employee of the Appellant's insured) was incurred during a loading and unloading operation within the meaning of the Appellant's liability policy. Stewart alleged he was injured through the negligence of the Appellee, Charles Walker (who was an insured of the Appellee, Hartford Accident and Indemnity Company). After this Declaratory Judgment action was filed and during the pendency thereof, and pursuant to stipulation and agreement by the parties hereto, the Stewart personal injury litigation was settled, both Fireman's Fund Insurance Company and

Hartford Accident and Indemnity Company contributing 50% to said settlement pursuant to said stipulation agreement wherein it was agreed that the final prevailing party in this action would be reimbursed by the non-prevailing party.

The sole issue to be determined here is the proper interpretation of the following exclusion clause found in Fireman's policy. This provision, as far as is here relevant, is found on the second page of Fireman's policy under the heading of "EXCLUSIONS" and states that Fireman's policy does not apply:

> "(f) under coverage A, to bodily injury to or sickness, disease or death of any employee of the insured arising out of and in the course of (1) domestic employment by the insured, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the insured;"

This case was submitted on a statement of Agreed Facts which statement is found on page 37 of the record herein and which statement of Agreed Facts incorporates the policies of both involved insurance carriers. In part the Agreed Facts state that Stewart was employed by Richard Griel (Fireman's insured) and that he was injured while acting in the course and scope of his employment by Griel. It is further agreed that Stewart was, at the time of the accident, covered

by workmen's compensation policy purchased by his employer and that Stewart made claim thereunder and that said claim was accepted as compensable and was further compromised and settled by Stewart and the Montana Industrial Accident Board.

The basic contention of the Appellant herein is, that by virtue of the aforequoted exclusion clause, coverage under Fireman's policy is excluded to any employee of *any* insured, be he the named insured or any omnibus insured. It is to be noted that the policy defines the unqualified word insured, under the heading "Insuring Agreements", paragraph III, as including the named insured and all other insureds generally referred to as omnibus insured.

The Appellees contend that said exclusion clause is applicable *only* where the employer-employee or master-servant relationship exists between the injured party and the insured seeking the coverage of the policy (in this case the otherwise omnibus insured, Charles Walker).

SPECIFICATION OF ERROR

The sole "specifications of error" herein consist of the OPINION and ORDER of the lower court which is dated May 31, 1967, and filed on June 5, 1967, and which is found on page 82 of this record and the judgment entered pursuant thereto, which judgment is

dated June 23, 1967, and filed and entered June 27, 1967, and found at page 86 of this record.

ARGUMENT

The Court's attention is first invited to the fact that, under the heading "Insuring Agreements" of Fireman's policy and more specifically paragraph III thereof, the word insured is defined. It is therein set out that the unqualified word "insured" includes the named insured and also any other insured, generally referred to as an omnibus insured. While Charles Walker was not the named insured it is admitted that he would be an omnibus insured except for the fact that, in this case, the injured party seeking redress was an employee of an "insured" (in this case the named insured).

On the second page of Fireman's policy and under the heading "EXCLUSIONS" it will be seen that the policy does *not* apply:

> "(f) under coverage A, to bodily injury to or sickness, diesase or death of any employee of the insured arising out of and in the course of (1) domestic employment by the insured, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law, of (2) other employment by the insured;"

This precise question has been litigated with a surprising amount of frequency in the various state and

federal jurisdictions around the nation. Admittedly there is some split of authorities on the issue. However, and as we shall clearly demonstrate, by far the majority of the decisions favor Fireman's position. It should also be noted that there is a definite trend in the more recent cases to so hold. Also we contend that the better reasoned cases support our position herein.

In general the basic reasons given by the various courts which have held that the word "employee" as used in both of these exclusion clauses refers to an employee of any insured are as follows:

1. That since the policy *itself* defines the unqualified word "insured" as any insured, either omnibus or named, then there cannot conceivably be any ambiguity requiring any interpretation.

2. That it is most unreasonable to interpret the exclusion provision as being inapplicable to an ombnius insured (except where the injured party is an employee of the omnibus insured) as this would be granting more protection to an omnibus insured than to a named insured when the latter actually takes out the policy and pays the premiums thereon.

3. That since the only "rationalization" for holding as contended by Hartford is first, the finding of "ambiguity" within the policy and then following the rule of resolving all ambiguities against the insurance company, to provide any and all possible persons with coverage, when

under circumstances such as there, the rule is inapplicable since in any event there would be coverage, therefore there is no reason for the rule, thus the rule itself should fail.

4. That any reasonable reading of such exclusion clauses plainly shows that the intent of the insurance industry, through their policies, is to exclude coverage to insured employers, whether they be named or omnibus, from suits by their own employees while still providing coverage for the public in general.

As a result of the undersigneds' research, it would appear that the law of the great majority of the jurisdictions has been interpreted as contended by Fireman's, said interpretations being either a result of a state court's or of federal court's decisions involving state law. It also appears that such a result has been arrived at in the Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits. It is also interesting to note that of the many decisions which support Fireman's position, eighteen have been decided between 1960 and 1967 inclusive. It is believed that this latter fact clearly discloses the modern trend is strictly adverse to Hartford's position herein.

The following citations and quotations are all from cases involving identical or very similar worded policies, (except as otherwise noted). It will be noted that these opinions give various reasons for their holdings, all of which are, however, basically contained in

the four (4) foregoing general statements. All involve similar factual situations.

Kelly v. State Automobile Insurance Association, 288 F.2d 734 (1961) (6th Cir.) (Ky.) (Reaffirmed in Am. Fid. & Cas. Co. v. Indemnity Inc. Co. of No. Am., 308 F.2d 697, (1962).)

> "In our case, the policy excluded coverage for bodily injury liability to 'any employee of an insured. * * *' It would seem clear that Underwood [truck owner] was 'an insured,' in fact the named insured which had taken out and paid for the policy of insurance. Rothast [plaintiff in tort case] was its employee and was injured while in its employment. The remainder of the exclusion excepted a domestic employee not covered by workmen's compensation.
>
> "Certainly Underwood, having paid for workmen's compensation insurance for the protection of its employees would not ordinarily take out liability insurance at its own expense to protect itself from any claim its employees might have against it or any third person. In other words, Underwood was paying for the protection of its liability insurance against claims asserted by the public, and not by its own employees.
>
> "In our judgment, if it was intended by the severability of interests clause to provide coverage in a case like the present one, the language used was inadequate for that purpose. We can only enforce the policy as it was written.

"The judgment of District Court, therefore, is affirmed."

United States Fidelity and Guaranty Co. v. American Fidelity and Casualty Co., 299 F.2d 215 (1962) (7th Circuit) (Ind.) (Reaffirmed in Farrell v. State Auto Ins. Assoc., 303 F.2d 897 (1962).)

"In the Michigan Mutual case, [297 F.2d 208], we approve the principle announced in decisions such as American Fidelity and Casualty Co. v. St. Paul-Mercury Indem. Co., 5 Cir. 248 F.2d 509; Michigan Mutual Liability Co. v. Carroll, e tal., 271 Ala. 404, 123 So.2d 920; Transport Insurance Co. v. Standard Oil Co. of Texas, 161 93, 337 S.W.2d 284. We specifically held, at page 211, that '* * * there is no liability when an employee of the named insured is injured while engaged in the employ of said insured.'

"We further stated in the Michigan Mutual case, at pages 211-212 'Considering the definition of the insured as contained in the policy, the clause may be read as follows: "This policy does not apply * * * to bodily injury to * * * any employee of the [named] insured while engaged in the employment of the [named] insured, * * *." The language seems to be unambibuous and clearly states that the policy does not cover accidents which result in injuries to the employees of the insured.'

"* * *

"The decision of the District Court herein was prior to the date when he announced the de-

cision in the Michigan Mutual Liability Company case. As hereinbefore indicated, there is considerable authority to support the view adopted by the District Court in the case at bar. However, consistent with our decision in Michigan Mutual Liability Co. v. Continental Casualty Company, et al., supra, and with decisions of the Courts of Appeal in the Fourth, Fifth and Sixth Circuits, we must and do hold that the judgment of the District Court be Reversed."

Lumber Mutual Casualty Ins. Co. of New York v. Stukes, et al, 164 F.2d 571 (4th Cir.) (1947) (S.C.)

"* * * It will be noticed that the language is 'the insured' and not 'the named insured', the latter being the language used in the policy where the intention is to designate only the person to whom the policy is issued; and the omnibus coverage clause, as above pointed out, defines the word 'insured' as used in the policy so as to include any person using the automobile with the permission of the named insured. The purpose of the exclusion clause is to limit coverage to liability for injury to members of the general public and to exclude liability to employees of the insured. (Citing cases).

"There can be no question that the purpose was to apply the exclusion to employees of an additional insured as well as to those of the named assured, when consideration is given to the clause providing that the omnibus coverage clause shall not apply where the person injured is an employee of the same employer as an employee driving the

car. It is true that if Timmons was an independent contractor he would not be an employee operating the car, and this clause would have no application to him; but its use in the policy shows clear intention that coverage shall extend only to liability to the public and that there shall be no coverage in the case of employees of *an* insured. * * *" (Emphasis supplied)

G. C. Kohlmier, Inc. v. Mollenhauer, 140 NW 2d 47 (Minn.) (1966).

"The fact that other unnamed persons are given protection as omnibus insured under the same policy is certainly no reason for extending their coverage beyond that which the named insured has prudently afforded himself.

"* * *

"The court in American Fidelity & Cas. Co. v. St. Paul-Mercury Ind. Co., 248 F.2d 509—5th Cir., has also handled effectively the argument that the proposed application of the exclusion clause in this case would commit the court to the anomalous position of denying the *named insured* coverage when the person injured is an employee of an omnibus insured. That court was *not* so committed, and indeed this court has already held that the *named insured* will not be denied coverage in such a situation. When the *named insured* is denied coverage, an ambiguity *does* arise since this result would obviously be contrary to the basic intent of the contracting parties to provide the named insured adequate protection. Then the 'plain meaning' of the language

must give way to the intentions of the contracting parties. In the case at bar the 'plain meaning' of the exclusion clause must prevail."

Transport Insurance Company v. Standard Oil Company of Texas, 337 S.W.2d 284 (1960) (Tex.)

"The exact question involved is one of first impression in this jurisdiction. There is a split of authority in other jurisdictions, but the *weight of authority* is that if the injured party is the employee of any person who is insured under the policy, the employee exclusion is applicable although he may not have been an employee of the person committing the tort. See 50 A.L.R.2d 99. The cases which support Transport's contention follow the weight of authority and apply the language of the policy as written.

"* * *

"In summation, since Annis was an employee of Transport Company of Texas, an insured under Transport's policy, and was injured in the course of such employment, and since exclusions (f) and (g) in plain and unequivocal language provide that the policy affords no coverage against the claim of an employee of the insured, and since the words 'against whom the claim was made' are not to be added to the contract, the judgment of the trial court in favor of Transport should be affirmed." (Emphasis supplied)

Simpson v. American Automobile Insurance Company, 327 S.W.2d 519 (1959) (Mo.)

"We find no ambiguity in the use of the word 'insured' in the exclusion clause. Its meaning when used in any clause of the policy was clearly defined in the omnibus clause of the policy. *We have no right to find ambiguity where none exists* merely for the purpose of invoking the rule that where ambiguity exists the construction most favorable to the insured must be adopted. As we said earlier, we are not permitted to exercise inventive powers or engage in perversion of language for the purpose of creating an ambiguity *when none exists.* (Citing case)

"Included in the points relied on by appellants is one that a policy covering an additional insured or insureds is in legal effect two policies of insurance; one a contract between the insurer and the named insureds and the other a contract between the insurer and the additional insureds and even though one of them shall be denied coverage, that alone will not prevent coverage of the others, despite the fact that the additional insureds' coverage may be broader than the named insureds'. *It seems to us that the proposition contains its own condemnation.* There is only one contract of insurance contained in American's policy and it must be construed as a whole. The additional insureds cannot claim coverage under the omnibus clause, which gives them coverage as additional insureds through definition of insureds, and then seek to ignore that very definition that gives them coverage, when considering the exclusion clause. The contention of appellants is unsound." (Emphasis supplied)

Fireman's Fund Indemnity Co. v. Mosaic Tile Co., 115 S.E.2d 263 (Geo.) (1960).

"* * * There is no dispute that the word 'insured' as so defined does extend the initial coverage of the insurance to the plaintiff Mosaic Tile Company, but is contended by Mosaic that the defined meaning of the word 'insured' does not apply to it as to the exclusions in the policy. We cannot agree with this contention, for a contract of insurance clearly defining the meaning of the word 'insured' *which leaves no ambiguity or deceptive verbiage, is not open to construction, and the literal meaning must be attributed to it.* If the exclusion applies to include also an additional insured, in this case the Mosaic Tile Company, then Mosaic in the final analysis has no coverage under this policy for the bodily injury.

"* * *

"It seems clear, then, by the terms of the policy itself that the word 'insured' when unqualified had a definite scope and meaning and that the words 'named insured' had a more restricted and narrow meaning. These two disparate meanings seem obvious in the contents of the policy. Therefore, there is no ambiguity in this insurance policy as to these matters, and so no construction is required or permissible. The language must be given its literal meaning and the words their plain and ordinary effect as defined in the policy. (Citing cases)

"The trial court erred in adjudging that the plaintiff was entitled to the protection of the

policy, and erred in refusing and declining to vacate and set aside its judgment." (Emphasis supplied)

General Accident Fire and Life Assurance Corporation, L.T.D., et al., v. Ray Brown, et al., 181 N.E.2d 191 (Ill.) (1962).

"* * * The exclusionary clause does not attempt to say who is an 'insured' within its scope. Elsewhere in the policy, however, the 'unqualified word "insured" ' is defined to include both the named insured and all those qualifying as additional insureds. There is nothing whatsoever in the policy to suggest that this definition is not intended to apply to the use of othe word 'insured' in the exclusionary clause. We think it clear that such definition was meant to apply. Had there been any intention to confine the term 'insured' in the exclusionary clause to the 'named insured,' the latter phrase certainly would have been used, just as it was used elsewhere in the policy, when intended. * * *

"* * *

"We must enforce the policy as written, and it is our opinion that the word 'insured' in the employee exclusionary clause of Employers' policy plainly means 'anyone who is insured under the policy.' "

Birrenkott, v. McManamay, et al., 276 N.W. 725 (S.D.) (1937).

"Appellant contends upon this appeal that the exemption clause relating to 'employees of the as-

> sured' should be limited to employees of the person for whom the policy is invoked, namely, McManamay. This court cannot agree with the contention of appellant. Such an interpretation of the exemption clause would mean that the policy offered greater protection from liability to one who obtained the consent of the assured to use his vehicle than it offered to the assured himself. It is the opinion of this court that when the clause in the policy protecting any person operating the insured vehicle with the consent of the assured is invoked, that the person invoking said clause is placed in the same position as the named assured. He is therefore subject to the general limitations of the policy in the same manner as the named assured would be * * * "

Associated Indemnity Corporation v. Wachsmith, 99 P.2d 420 (Wn.) (1940) (Reaffirmed in Utah-Idaho Sugar Company v. Washington Farm Mutual Insurance Company, 331 P.2d, 538 (Wn.) (1958).)

> "We do not think this contention can be sustained, because, as the unqualified term 'insured' is defined in the policy to mean and include 'every person entitled to protection hereunder, 'surely it cannot be logically contended that R. Wachsmith, Sr., the one to whom the policy was issued, and who paid for it, is not entitled to protection under the policy. If this be true, then it must follow, we think, that R. Wachsmith, Sr., is an insured under the policy at all times, and that Buss, being his employee at the time he was injured, is not covered by the policy, regardless of

whether or not Buss was also an employee of Richard Wachsmith, Jr., the additional insured and judgment debtor herein. The trial court concisely summed up the matter in his memorandum opinion, when he stated: 'It seems to the court, also, that the definitive clause supports this conclusion. It states that "the unqualified term 'insured' shall include every person entitled to protection hereunder * * *" Certainly, the named assured is one entitled to protection under the policy; therefore, he is included within the meaning of the term "insured". Since he is so included, Buss, as his employee, comes directly within the terms of the "Risks Not Covered" paragraph."

United States Fidelity and Surety Company v. Western Casualty and Surety Company, 408 P.2d 596 (Kan.) (1965).

"We find no ambiguity in the language used. We should not seek ambiguity where none exists merely for the purpose of invoking the rule of liberal construction.

"*In a case involving a dispute between two insurance companies we do not have occasion to apply the rule of liberal or extended interpretation which is sometimes necessary to protect a layman in the coverage which he thought he was receiving.*

"In Esfeld Trucking, Inc., v. Metropolitan Insurance Co., 193 Kan. 7, 392 P.2d 107, we stated:

'We believe the policy is clear and unambiguous and there is no need for judicial interpretation or the application of rules of liberal construction (citing case) particularly since this is an action between two insurance companies who draw their own policies and should know the meaning of the words used in those policies as they are understood in the general field of insurance.'

"We conclude that if an injured party is an employee of the named insured under an automotive liability policy, he is excluded by a provision which excludes 'bodily injury to an employee of the insured arising out of and in the course of employment * * * by the insured' even though he may not have been the employee of an unnamed insured under the policy whose employees committed the tort.

"The exact question involved is one of first impression in this jurisdiction. There is divided authority in other jurisdictions *but the great weight of authority* appears to be in harmony with the views expressed herein. The cases from other jurisdictions have become too numerous to justify citation for the purpose of classification. Those wishing to research the cases should see the annotation in 50 A.L.R.2d 78 and A.L.R.2d, Supplemental Service, Vol. 2, p. 3203 and Vol. 4, p. 1138." (Emphasis supplied)

Benton v. Canal Insurance Company, 130 So.2d 840 (Miss.) (1961).

"In the case we have here, the policy issued by Canal to Stubbs was written for the benefit of Stubbs to protect him from liability for injuries to third parties. The policy excluded coverage for injuries to Benton, an employee of Stubbs, the named insured. Western Casualty and Polk were not parties to the contract of insurance and had nothing to do with the writing of the policy. Polk was not a named insured. Polk was an employee of the Steel Corporation. He claims under the Canal policy only as an additional insured under the general language of Insuring Agreement III. Under these circumstances *it seems strange indeed that Polk should claim, or that there should be claimed for him, more protection under the policy of Stubbs than Stubbs, the named insured, who paid for the policy, could claim for himself.* Yet Polk and Western Casualty, as Benton's assignee, now seek to recoup from Stubbs' insurance carrier the amount of the judgment rendered against Polk and his employer in favor of Benton for injuries suffered by Benton as a result of the negligence of Polk and his employer, by having the court construe the words 'any employee of the insured', as they appear in the Exclusions clauses of Canal's policy, to mean 'any employee of the insured against whom liability is sought to be imposed.' This we cannot do. The language of the policy is unambiguous. Since the language is plain and unambiguous there is no occasion for construction, and the language must be given its plain meaning. * * *" (Emphasis supplied)

Auto Racing, Inc. v. Continental Casualty Company, 304 F.2d 697 (10th Cir.) (1962) (this case has reference to a differently worded exclusion clause but affirms the general proposition).

> "It is settled law that the primary purpose of an exclusion clause in a public liability policy, such as we have here under consideration, is to draw a sharp line between employees who are excluded and members of the general public. State Farm Mut. Automobile Ins. Co. v. Braxton, 4 Cir. 157 F.2d 283, 285. *There can be no question but that the purpose was to apply the exclusion to employees of an additional insured as well as to those of the named insured.* Lumber Mutual Casualty Inc. Co. of New York v. Stukes, 4 Cir. 164 F.2d 571. The purpose of the exclusion clause is to limit coverage of liability for injury to members of the general public and to exclude liability to employees of the insured. (Citing cases.)" (Emphasis supplied)

Buhonick v. American Fidelity & Casualty Company, 190 F. Supp. 399 (1960).

> "For purpose of deciding the issue herein posed, it is incumbent upon me, therefore, to determine how the appellate court of Indiana would resolve this same question if squarely prsented to that court.
>
> "*In approaching the problem, it is my judgment that the dominant appellate decisional conclusions throughout the United States should be*

given great weight in projecting and prognosticating the law of Indiana.

"In spite of the conflict of authorities which exist from other states, I am satisfied *that the weight and best reasoned authorities hold to the view that the exclusion provision applies to employees of an additional assured as well as to those of the named assured.* (Citing cases)." (Emphasis supplied)

In addition to all the foregoing quoted cases the following listed cases also hold to precisely the same effect as those we have quoted from. However, in the interests of keeping from making this brief too cumbersome we shall merely list the following cases and respectfully invite the Court's attention to the same as they all unequivocally support the Defendant's position in this Declaratory Judgment action. These additional cases are:

Campbell v. American Farmers Mutual Insurance Co., 238 F.2d 284 (8th Cir.) (1956) (Mo.);

Miller and Buchong, Inc. v. Travelers Insurance Company, 231 F. Supp. 128 (1964) (Penn.);

Michigan Mutual Liability Co. v. Carroll, 123 So.2d 920 (Ala.) (1960);

Connelly v. London & Lanchire Indemnity Co., 28 A.2d 753 (1942) (R.I.);

Farmers Elevator Mut. Ins. Co. v. Austad, 366 F.2d 555 (8th Cir.) (1966) (N.D.);

Ohio Casualty Insurance Company v. U. S. F. & G., et al., 223 N.E.2d 851 (Ill.) (1967);

Vaughn v. Standard Surety & Casualty Co., 184 S.W.2d 556 (Tenn.) (1944)

Humble Oil & Refining Co. v. American Fidelity & Cas. Co., 232 F.Supp. 953 (1962) (Va.);

American Fidelity & Casualty Co. v. Indemnity Insurance Company of North America, 195 F. Supp. 648 (1961) (Ohio) (affirmed in 308 F.2d 697, cert. denied 372 U.S. 942, 83 S. Ct. 935);

American Fidelity Co. v. Deerfield Valley Grain Co., 43 F. Supp. 841 (Vt.) (1942);

Maryland Casualty Company v. American Fidelity and Casualty Company, 330 F.2d 526 (6th Cir.) (1964) (Tenn.);

State Farm Mutual Ins. Co. v. Employers Fire Ins. Co., 123 S.E.2d 108 (N.C.) (1961).

Finally in this connection we would like to call the Court's attention to American Fidelity and Casualty Co. v. St. Paul-Mercury Indemnity Company, 248 F.2d 509 (1957). This is an opinion from the Fifth Circuit and we believe it to contain one of the most thorough discussions on this particular problem which we have yet found. In view of the fact that so much of the opinion is so valuable and relevant it would be impossible to do justice by quoting mere portions therefrom. It is with this thought in mind that we

respectfully request that this Court review the entire opinion.

The Court's attention also again is invited to the second page of Fireman's policy and under the heading "EXCLUSIONS" will be seen that this policy does not apply:

> "(e) under coverages A and B. to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;"

All of the foregoing law, of course, is equally applicable to this exclusion, as the same issue arises—namely whether or not the word insured as used therein means the named insured, all insureds or only the insured seeking protection of the policy. A number of the hereinbefore cited cases also refer to this particular exclusion and therefore whatever interpretation is accepted in reference to subsection (f) of the exclusions is equally applicable to subsection (e).

FEDERAL DISTRICT COURT OPINION AND ORDER

While the district court decision was adverse to Appellant's position, nevertheless it is extremely clear that Judge Smith so held with a great deal of reluctance. This Court's attention is invited to the lower court's opinion and order (page 82 of this record)

and more specifically to page 2 thereof wherein Judge Smith spoke, in part, as follows:

> "Had no court considered this problem, and were this a case of first impression, *I would be persuaded to adopt the defendant's position and hold that the language of the policy is not ambiguous, and the unqualified use of the word 'insured' in the exclusion clauses included both the named insured and the omnibus insured and their respective employees.* Here, however, I must determine what path the Montana Supreme Court would take in light of all that has been written by many courts."

and further on at page 3 of said opinion and order:

> "* * * the real fact of this diversity of opinion bewteen courts and within courts overcomes *the conclusion that I would reach were I left alone with nothing but the words of the policy to consider.*" (all emphasis supplied)

It thus is clear that Judge Smith's own judicial opinion was in conformity with the Appellant's position herein, but for some reason, he feels that the Montana Supreme Court would not agree.

As above noted, Judge Smith stated in his opinion that his holding would be different if he were "* * * left alone with nothing but the words of the policy to consider." We respectfully submit that Judge Smith erred in not doing that, as the Montana Supreme Court has clearly committed itself to such a principle

of insurance contract interpretation. And it precisely so held in 1957 in the case of James v. Prudential Insurance Company of America, 312 P.2d 125 (127) wherein the Montana Supreme Court spoke as follows:

> "The plaintiff urges a number of cases to the effect that an uncertain contract should be interpreted most strongly against the party causing the uncertainty. Such is the Montana rule. R.C.M. 1947, § 13-720. But even though it is a cardinal principle of insurance law that a contract of insurance is to be construed liberally in favor of the insured and strictly against the insurer, contracts of insurance should be given a fair and reasonable construction. Park Saddle Horse Co. v. Royal Indemnity Co., 81 Mont. 99, 111, 261 P. 880. In arriving at such construction, no matter how strictly construed against the insurer, the intention of both insurer and insured *is to be ascertained from the language of the policy.* R.C.M. 1947 § 13-704. Effect must be given to every part of the policy contract. R.C.M. 1947, § 13-707. The words of the contract are to be understood in their usual meaning R.C.M. 1947, § 13-710. Common sense controls. (Emphasis supplied)

In this same connection please see the Montana case of Johnson v. Metropolitan Life Insurance Co., 83 P.2d 922 (1938) wherein the court, after stating that the rights and liabilities of the parties are gov-

erned by the *provisions* of the policy, goes on to state, on page 924 of the Pacific Reporter as follows:

> "* * * On the other hand, if there is no ambiguity [meaning within the policy] and the provisions of the contract of insurance are plain and clear and lend themselves to but one construction, it is the duty of the court to give to the contract that one plain and clear construction, and not to attempt to rewrite for the parties a contract differing from one to which the parties agreed. In this latter respect a contract of insurance does not differ in its construction from any other contract. It is incumbent on this court to examine the four corners of this contract to determine whether such ambiguity exists (citing cases), and if it does not, then this court is powerless to make a contract for the parties contrary to the one expressed in the agreement. (citing cases.)"

In view of the foregoing, and particularly since Judge Smith expressly states that he can find no ambiguity *within the policy*, it is respectfully suggested that Judge Smith erred in that he apparently confused what he found to be "ambiguity" among the various decisions, as being synonymous with ambiguity within the policy. This clearly is not Montana law.

Perhaps this would be the proper place to inform this Court that the following cases, all very recently decided, had not been reported at the time the brief-

ing was done for the District court and consequently were not called to Judge Smith's attention. All three cases unequivocally support the Appellant's position herein. These cases are: Farmers Elevator Mutual Insurance Co. v. Austad, 366 F.2d 555 (8th Cir.) (1966) (N.D.; Ohio Casualty Insurance Company v. U.S.F.&G., et al, 223 N.E.2d 851 (Ill.) (1967); St. Paul Fire & Marine Insurance Co. v. Wabash Fire & Casualty Insurance Co., 264 F.Supp. 637 (Minn.) (1967).

One of the most important developments that has occurred since the rendition of Judge Smith's Order herein, is the fact that a Montana District Court has had the precise same point before it and has held adversely to Judge Smith's ruling.

In the case of "The Travelers Insurance Company, a corporation, Plaintiff v. American Casualty Company of Reading, Pennsylvania, a corporation, et al, Defendants" the Honorable Paul G. Hatfield, Judge of the Eighth Judicial District of the State of Montana, had the precise question before him, based on identically worded exclusions. Obviously it was encumbent upon Judge Hatfield to apply Montana law to the issue. The action was also a declaratory judgment action. The Travelers case was argued on June 20, 1967, (the district court's order herein having been made on May 31, 1967) and Judge Smith's decision herein was argued by the Defendant, American

Casualty Company, in support of its position (the same position as Hartford's herein). The undersigned was personally present at the argument and in fact participated therein as this firm represents one of the parties to the Travelers case. Obviously Judge Hatfield did not subscribe to Judge Smith's opinion as evidenced by the following excerpts from the Findings of Fact, Conclusions of Law and Judgment entered by Judge Hatfield on July 12, 1967.

Paragraph VI of the Findings of Fact reads, in its entirety, as follows:

> "The word 'insured' in the American Casualty Company policy is defined, so far as here material as follows:
>
> "III Definition of Insured: The unqualified word "insured" includes the named insured and also includes . . . (2) under coverages A and C any person while using an owned automobile . . . any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission . . .'
>
> (Sheet 2 of Exhibit "D", Agreed Statement)

Under the section covering "Exclusions" said American Casualty Company policy provides:

> 'This policy does not apply:
>
> * * * * *
>
> '(f) Under the coverages A and B, to any

obligation for which the insured or any carrier of his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;

'(g) Under Coverage A, to bodily injury or to sickness, disease or death of any employee of the insured arising out of and in the course of (1) domestic employment by the insured, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the insured;'

(Sheet 3 of Exhibit "D", Agreed Statement)"

The following is an excerpt of Paragraph II of the Conclusions of Law in the Travelers case:

"The language of the American Casualty Company policy is not ambiguous, nor is it made ambiguous by the "Severability of Interests" clause contained therein, and the said American Casualty Company policy specifically excludes coverage, either to the named insured or to any omnibus insured, under Exclusions (f) and (g) hereinabove referred to, with respect to bodily injury to Bert W. Court, as claimed in said Civil Action 63674-B, and is likewise excluded with respect to any other person and the State of Montana who now or may hereafter claim under said Bert W. Court."

It will be noted that "Exclusion (f)" of Travelers policy is identical to "Exclusion (e)" of Fireman's

policy herein and that "Exclusion (g)" of Travelers policy is identical to "Exclusion (f)" of Fireman's policy. It will also be noted that the definition of the unqualified word insured is identical in both policies.

(The Findings of Fact, Conclusions of Law and Judgment in the Travelers case are found in their entirety, as Exhibit "A" to Appellant's Affidavit in Support of its Motion for Extension of Time and "Abstention" and which is on file herein.)

The Travelers Insurance Company has appealed Judge Hatfield's order to the Montana Supreme Court and that appeal is presently pending and will be decided in the near future, although obviously, the writer cannot state just when. However, in view of the fact that the Montana Supeme Cout does, and has for some years past, decided cases with great dispatch, it is suggested that this decision will be forthcoming in the near future. At this point we might again, if the same is proper, call the Court's attention to our Motion for Abstention for all of the reasons set out in the affidavit in support thereof, which will not be repetitiously set out herein.

We, of course, realize that this Court is certainly not bound by the holding of a state district court, but we do suggest that the same is entitled to great weight herein because of the presumption of the correctness of the lower court holding.

CONCLUSION

The actual question to be determined by this Court is what the contracting parties to the Fireman's policy agreed to as determined from the language of the policy. Is it reasonable to hold that, when the policy itself defines the unqualified word insured as including all insureds, nevertheless it means something different *only* when used in the exclusion clauses? Is it reasonable to assume that the named insured, who pays the premium on the policy, intended to contract for and receive less coverage than some "fortuitous" omnibus insured? We suggest that such is grossly unreasonable.

Respectfully submitted.
KELLER, MAGNUSON AND REYNOLDS
AND GLEN L. DRAKE
DAVID O. DeGRANDPRE

By:_____
Attorneys for Appellant.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____
Attorney